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No. 97-450

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JANE D. HILL, - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

PETITIONER'S REPLY BRIEF

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12pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
1. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER OF A JUDICIAL FORUM UNDER THE FAA IS UNRESOLVED	3
2. A MAJORITY OF THIS COURT HAS VOTED IN SEPARATE CASES NOT TO REQUIRE ARBITRATION UNDER THE FAA OF STATE COURT ACTIONS	4
3. *GILMER* DOES NOT FORECLOSE CONSIDERATION OF THE ISSUE RAISED IN THE PETITION	7
4. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER CAN PROPERLY BE CONSIDERED BY THIS COURT	8
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Cases:

Allied-Bruce Terminix Companies, Inc. v. *Dobson*, 513 U.S. ____, 115 S.Ct. 834 (1995) ... 5

Edmondson v. *Pennsylvania National Insurance Co.*, KY 781 S.W. 2d 753 (1989) 4

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ..... passim

Illinois v. *Gates*, 462 U.S. 213 (1983) 8

Perry v. *Thomas*, 482 U.S. 483 (1987) 3, 5

Prudential Insurance Co. v. *Lai*, 42 F.3d 1299 (11th Cir. 1994), cert. denied 116 S.Ct. 61 (1995) 4

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 4, 5, 6, 8

Volt Information Sciences, Inc. v. *Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468 (1989) 4

Yee v. *Escondido*, 503 U.S. 519 (1992) 8

Statutes:

Federal Arbitration Act, 9 U.S.C. §2 (1994) 3, 4, 5

Kentucky Revised Statutes 336.700 ..... 5, 6

Kentucky Revised Statutes 417.050 6

Miscellaneous:

A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Disp. Res. J. Oct-Dec. 1995 2

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INTRODUCTION

In *Gilmer*[1], this Court held that a securities industry registration application requiring arbitration of any controversy "arising out of employment" was a contract under the Federal Arbitration Act ("FAA") and operated to require arbitration of a statutory civil rights claim. The opinion did not discuss whether Mr. Gilmer knowingly and voluntarily waived his right to a judicial forum, but "left for resolution in specific cases" the issue of unequal bargaining power between the parties, observing that Gilmer

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[1] *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

was an experienced businessman who did not claim he was coerced or defrauded. 500 U.S. at 33

In the present case, Hill petitions this Court to examine the issue, decided but not discussed in *Gilmer*, of whether mandatory predispute arbitration of employment disputes is permissible under the FAA. Hill's petition argues that it is impossible for an employee either knowingly to waive a claim before it has arisen or voluntarily agree to arbitration if it is imposed as a condition of getting or keeping a job. (Pet. at 9-11) Further, it contends that the response to employer imposed arbitration has been increased litigation over arbitrability issues and virtually unanimous criticism by professional arbitrators and the civil rights community. (Pet. at 5-8) The analytical core of the rejection of *Gilmer* by these groups, which are necessary for the practical success of arbitration as alternative dispute resolution, is that the viability of the process rests on its truly voluntary acceptance by both employers and employees. Systems designed exclusively by employers and imposed on employees simply cannot be workable private mechanisms to resolve employment disputes. Mandatory arbitration will continue to be challenged in court so long as those who are accused of wrongdoing are free both to design and impose the system to decide the claim. Foxes are poor guardians of hen houses.

Ironically, one of the developments following *Gilmer* was the development of the Protocol reflecting a broad based consensus on the procedures necessary for effective arbitration of employment disputes. (Pet. at 8) As yet, however, employers have been slow to accept the procedures set forth in the Protocol and there is no effective way to compel such acceptance.

With this background, Hill's petition suggests that voluntary arbitration, agreed to after a dispute has arisen, is the only viable solution. It is just as efficient as manda-

tory arbitration and has the advantage of eliminating arbitrability disputes. (Pet. at 10-12) The proponents of mandatory arbitration were challenged by Hill's petition to articulate any reason why it was preferable, other than it retained a real or perceived procedural advantage for the employer and resulted in reducing the employer's damages. (Pet. at p. 11 n. 21)

Astonishingly, neither brief in opposition even attempts to refute Hill's argument that mandatory arbitration is unworkable and voluntary arbitration is the preferable alternative. Instead, Respondent Brab argues (Opp. at 3-5) that the FAA permits only mandatory arbitration. The Hilliard Respondents argue (Opp. at 6-9) that *Gilmer* forecloses consideration of whether mandatory arbitration is required under the FAA. Both briefs in opposition assert that Hill's voluntary arbitration argument should not be considered because it was not presented to the lower courts. These points in opposition are considered in order.

1. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER OF A JUDICIAL FORUM UNDER THE FAA IS UNRESOLVED

Respondent Brab concedes that the issue of a knowing and voluntary waiver of an employee's right to a judicial forum has never been addressed by this Court. (Opp. at 5-6) Nonetheless, he argues that this Court's statement that Section 2 of the FAA "embodies a clear federal policy *requiring* arbitration"[2] (emphasis added) precludes a system of voluntary arbitration.

The flaw in Brab's argument is that the quoted language is taken out of context and the remaining language in FAA Section 2 is ignored. Arbitration is not required if the contract is "revocable upon such grounds as exist at

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[2] *Perry* v. *Thomas*, 482 U.S. 483, 489-90 (1987).

law or in equity." Clearly, as Brab concedes, both federal and Kentucky law provide for the revocability of the contract if the waiver was not knowing and voluntary. *Prudential Insurance Co.* v. *Lai*, 42 F.3d 1299 (11th Cir. 1994), cert. denied 116 S.Ct. 61 (1995); *Edmondson* v. *Pennsylvania National Insurance Co.*, Ky. 781 S.W.2d 753, 755 (1989).

The basis for this Court's decisions implementing the FAA is that agreements to arbitrate should be "as enforceable as other contracts, but not more so." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468, 478 (1989) That the FAA requires arbitration pursuant to traditional contract law does not foreclose the concededly undiscussed issue Hill seeks to have this Court address: was her waiver of a judicial forum knowing and voluntary so that the agreement requiring arbitration was not revocable?

2. A MAJORITY OF THIS COURT HAS VOTED IN SEPARATE CASES NOT TO REQUIRE ARBITRATION UNDER THE FAA OF STATE COURT ACTIONS

The genesis of the preemptive effect of the FAA in state court actions is *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). There the Court held that in enacting Section 2 of the FAA, Congress created a body of substantive law, under the Commerce Clause, applicable to both federal and state courts. Chief Justice Rhenquist and Justice O'Connor dissented on the ground that the FAA by its terms is applicable only to federal courts.[3] Justice Stevens dissented separately on the ground that the exception based "on such grounds as exist in law or equity" was broad enough to permit state resolution restricting arbitration of various claims.[4]

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[3] 465 U.S. at 21.

[4] 465 U.S. at 17.

Subsequently, in *Perry* v. *Thomas*, 482 U.S. 483 (1987) the Court held that Section 2 of the FAA preempted a California statute precluding arbitration of wage collection actions. Justices Stevens and O'Connor dissented for the reasons stated in *Southland*.[5]

More recently, in *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 513 U.S. ____, 115 S.Ct. 834 (1995) the Court held that an Alabama statute making predispute arbitration agreements unenforceable was preempted by the FAA so as to require arbitration of a claim brought in state court for termite damage. Justices Thomas and Scalia dissented, essentially for the reasons stated in the dissents in *Southland*, that Congress never intended to apply the FAA to state courts or to require specific enforcement of an arbitration clause in the face of a contrary state statute.[6] However, Justice O'Connor concurred in the Court's opinion on *stare decisis* grounds, even though she "continue[d] to believe" *Southland* was wrongly decided.[7]

Thus, a majority[8] of this Court has voted, albeit in different cases, against applying the FAA to preempt state court actions.

The Kentucky Statutes are clear that, even though arbitration generally is favored, mandatory arbitration of employment disputes is prohibited. KRS 336.700 prohibits employers from requiring an employee to waive any statu-

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[5] 482 U.S. at 493-4.

[6] 115 S.Ct. at 845.

[7] 115 S.Ct. at 843-4.

[8] Chief Justice Rhenquist, Justices Stevens, O'Connor, Scalia and Thomas.

tory claim.[9] In addition, KRS 417.050 specifically removes from the Uniform Arbitration Act "arbitration agreements between employers and employees."[10]

It is respectfully submitted that this case provides the Court with an appropriate vehicle to reexamine *Southland*. There is surely little justification for a federal statute to require arbitration of state civil rights and common law tort claims arising out of an alleged rape. There is even less justification to require arbitration of those claims when a majority of this Court has rejected the decisional basis for the application of the FAA.

The unstated reason for this Court's enchantment with the FAA is its usefulness in reducing the caseload burden in the federal courts. It may well be that mandatory arbitration is an effective procedure to reduce this burden. There is no justification, however, for this Court to impose the same procedure on the fifty state courts, which may or may not be confronted with the same problem. Indeed, in the instant case Kentucky has gone out of its way to require a judicial forum for the dispute. If any of the state

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[9] KRS 336.700 provides: Notwithstanding any provision of the Kentucky Revised Statutes to the contrary,no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revisd Statutes or any federal law.

[10] KRS 417.050 provides: A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to arbitration agreements between employers and employees or between their respective representatives and does not apply to insurance contracts.

courts have a caseload problem, each state should be free to deal with it in its own way.

In *Gilmer*, this Court emphasized that a plaintiff's legal right to press his claim was undiminished and the only difference was the forum in which the claim was heard. There may be justification for requiring arbitrators to hear cases which would otherwise be brought in federal courts, but there is no good reason why an arbitral forum imposed by a defendant should displace a state court.

3. *GILMER* DOES NOT FORECLOSE CONSIDERATION OF THE ISSUE RAISED IN THE PETITION

Hill's petition argues (Pet. at 10) that the rejection of mandatory arbitration by professional arbitration organizations and the EEOC, whose support is necessary for the success of any private system of dispute resolution, means that court challenges to mandatory arbitration will continue. The Hilliard Respondents counter that the lower courts have uniformly required arbitration pursuant to *Gilmer* and the law is therefore not unsettled.

This response misses the point. The goal is to have less court litigation. The practical effect of mandatory arbitration after *Gilmer* has been increased challenges to arbitration and other procedural issues which are clearly going to continue. Given this state of affairs, Hill's petition raises the pertinent question whether employer designed and imposed arbitration systems are a necessary part of private employment dispute resolution. If the mandatory aspect of the system is unnecessary and counterproductive, it should be eliminated just as it was created: by judicial fiat.

The suggestion by the Respondents that Hill's arguments are properly addressed to Congress, not this Court, is also nonresponsive. They concede the issue of knowing

and voluntary waiver was not discussed in *Gilmer*. Why, then, should Congress address an issue that was decided, though not really considered by this Court? The current expansive reach of the FAA is entirely a creation of this Court. If it is not working, this Court should fix the problem rather than leave the job to Congress.

4. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER CAN PROPERLY BE CONSIDERED BY THIS COURT

Both Brab and the Hilliard Respondents contend that Hill's petition runs afoul of the rule that, in reviewing state court judgments, this Court will not consider claims not raised or addressed below. *See Illinois* v. *Gates*, 462 U.S. 213, 218-20 (1983)

The flaw in Respondents' contention is that it ignores the difference between Hill's claim and the arguments she has advanced to support that claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)

Hill's consistent federal claim has unquestionably been that the FAA under *Gilmer* does not compel arbitration of state court civil rights and tort claims. The Kentucky Court of Appeals opinion was squarely based on its understanding of the FAA and *Gilmer*. (Petition for Certiorari, Appendix 5A-9A) There can be no doubt the federal claim was raised and decided below.

It may well be that Hill's arguments to the lower courts were more narrowly tailored. The broader arguments raising issues decided but not discussed in *Gilmer*, and inviting a reexamination of *Southland* could not realistically have been decided below and are properly addressed to this Court.

CONCLUSION

This Court's decisions have expanded the FAA to preempt state law prohibiting arbitration of claims for wage payment and termite damage. They permit employers to design and impose involuntary arbitration systems on employees for the conceded purpose of avoiding the potential monetary exposure inherent in a judicial forum. These decisions should not be further expanded to require mandatory arbitration of state court civil rights and tort claims arising out of rape.

Respectfully submitted,

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